Susan Cheah Pik Yee & Ors v Mayban Finance Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT PROCEEDINGS NO S22–22–551 OF 1995

ABDUL HAMID SAID J

3 MARCH 2003

Tort *— Negligence — Banks — Loss of valuables from safe deposit boxes — Inadequate alarm system — Police unable to gain entry into bank as key-holding employees of bank not contactable — Whether bank negligent*

Tort *— Negligence — Banks — Loss of valuables from safe deposit boxes — Lots of cash and valuables stored in strong-room of bank — Whether reasonably foreseeable to have infra-red motion detectors and seismic detectors installed in strong-room of bank*

Tort *— Negligence — Res ipsa loquitor — Cause of loss known — Whether doctrine of res ipsa loquitor applicable*

The plaintiffs had hired safe deposit boxes at the defendant's branch at Taman Cheras, Kuala Lumpur ('the branch'). There was a break-in at the branch sometime between 2 March 1995 and 6 March 1995. Burglars tunneled underground, dug their way through the strong-room floor of the branch, broke open and emptied safe deposit boxes therein. The plaintiffs claimed for delivery of their goods. Alternatively, they claimed for damages for the loss of their goods, interests and costs. The plaintiffs pleaded causes of action in bailment, contract and tort although submissions proceed on the grounds of contract and tort only. The plaintiffs pleaded 'res ipsa loquitor'. The issue was whether the defendant was negligent. The facts revealed that at the material time, the branch was empty and no security guard was on duty. It was alleged however, that there was a comprehensive alarm system in operation. The system was connected to a Central Monitoring System ('CMS') where in the event of an alarm triggering, the people monitoring the system would send a security team to the premises, inform the police and also inform any one of two key-holding employees of the defendant branch. The facts further revealed that on 3 March 1995 at about 11.59am, an alarm was triggered at the defendant's branch. A security team was sent and the police were informed but they could not enter the branch premises as both the defendant's key-holders could not be contacted. The defendant submitted that the risk of a break-in the manner in which it occurred was too remote and such a break-in was not reasonably likely to happen. Because of such remoteness, the floor of the strong room was not reinforced and neither was the defendant advised to connect the room to the alarm system. The parties agreed to have the High Court judge determine liability with damages to be assessed by the senior assistant registrar.

Held, finding the defendant wholly liable for the loss, awarding costs to the plaintiffs and ordering damages be assessed by the senior assistant registrar:

(1) On the facts, the cause of loss was known and res ipsa loquitor had no application in the instant case. The issue was whether there was some want of care by the defendant (see p 381C–D); *Wong Eng v Chock Mun Chong & Ors* [1963] MLJ 204 and *Russel v London & South Western Railway Co* [1908] 24 TLR 548 referred and *Bolton v Stone* [1951] AC 850 followed.

(2) In the instant case, when the alarm was triggered at the defendant's branch, the CMS people sent their security people to the defendant's premises. The police were also informed. However, the CMS people and the police were not able to enter the premises as the two key-holders were not available. There was no instruction from the defendant's headquarters that one of the key-holders had to be available all the time. Neither was there any explanation why both were not available. The security system required the key-holders to be readily available when the alarm was activated. The defendant had failed to do this. This was therefore a clear case of negligence on the part of the defendant and/or its agents. It was for the defendant to be aware of the existence of devices or detectors available and to use them to protect the plaintiffs' valuables. It was insufficient to rely only on the alarm unless the price of these devices was extremely excessive (see pp 381F–G, 382B, D–E); *Shelton v ANZ Banking Group* [1984] VC LEX 329 followed.

(3) As a reasonable banker, the defendant should have foreseen that it was not sufficient to have a basic security system and/or devices in its premises that stored so much cash and valuables. The security system did not have an infra-red motion detector or seismic detectors. It was reasonably foreseeable to have infra-red motion detectors on the floor of the strong-room as burglars would be attracted to the valuables in the strong room and would employ whatever means to get at them. It was foreseeable that seismic detectors or infra-red motion detectors would be valuable devices to protect the floor of the strong-room and the valuables therein (see pp 383H–384A).

[Bahasa Malaysia summary

Plaintif-plaintif telah menyewa peti-peti besi keselamatan di cawangan defendan di Taman Cheras, Kuala Lumpur ('cawangan tersebut'). Satu kejadian pecah masuk telah berlaku di cawangan tersebut antara 2 Mac 1995 dan 6 Mac 1995. Pencuri-pencuri telah menggali lubang bawah tanah, dan menggali diri mereka sehingga sampai ke lantai bilik kukuh cawangan tersebut, memecah buka dan mengosongkan peti-peti tersebut. Plaintif-plaintif telah menuntut penghantarserahan

barangan mereka. Secara alternatif, mereka menuntut ganti rugi kerana kehilangan barangan, kepentingan mereka dan kos. Plaintif-plaintif telah memplidkan kausa-kausa tindakan dalam bailmen, konrak dan tort walaupun penghujahan-penghujahan dimulakan atas alasan-alasan kontrak dan tort sahaja. Plaintif-plaintif telah memplidkan 'res ipsa loquitor'. Persoalan adalah sama ada defendan adalah cuai. Fakta-fakta mendedahkan pada masa matan, cawangan tersebut tiada orang dan tiada pengawal keselamatan sedang bertugas. Ia dikatakan bagaimanapun, bahawa terdapat satu sistem penggera keselamatan yang komprehensif yang berfungsi. Sistem tersebut disambungkan kepada Sistem Kawalan Utama ('SKU') di mana sekiranya penggera berbunyi, orang yang mengawal sistem tersebut akan menghantar sepasukan keselamatan ke premis tersebu, memaklumkan pihak polis dan juga memaklumkan salah satu dari dua orang pekerja yang memegang kunci kepada cawangan defendan tersebut. Fakta-fakta seterusnya mendedahkan bahwa pada 3 Mac 1995 lebih kurang pukul 11.59am, satu penggera telah berbunyi di cawangan defendan. Sepasukan keselamatan telah dihantar dan pihak polis telah dimaklumkan tetapi mereka tidak dapt memasuki cawangan tersebut kerana kedua-dua pemegang kunci defendan tidak dapat dihubungi. Defendan telah berhujah bahawa risiko berlaku kejadian pecah masuk sebagaimana ia telah berlaku tidak boleh diduga dan satu kejadian pecah masuk sedemikian secara munasabah tidak mungkin berlaku. Oleh kerana sifatnya yang tidak boleh diduga, lantai bilik kukuh tersebut tidak diperkukuhkan dan defendan tidak dinasihatkan untuk menymabungkan bilik tersebut kepada sistem penggera. Pihak-pihak bersetuju agar hakim Mahkamah Tinggi menentukan liabiliti dan ganti rugi ditaksirkan oleh penolong kanan pendaftar.

Diputuskan, mendapati defendan bertanggungjawab sepenuhnya untuk kerugian tersebut, mengawardkan kos kepada plaintif-plaintif dan mengarahkan ganti rugi ditaksirkan oleh penolong kanan pendaftar:

(1) Berdasarkan fakta-fakta, sebab kehilangan diketahui dan res ipsa loquitor tidak terpakai dalam kes semasa. Persoalannya adalah sama ada perlunya ada sifat berjaga-jaga oleh defendan (lihat ms 381C–D); *Wong Eng v Chock Mun Chong & Ors* [1963] MLJ 204 dan *Russel v London & South Western Railway Co* [1908] 24 TLR 548 dirujuk dan *Bolton v Stone* [1951] AC 850 diikut.

(2) Dalam kes semasa, apabila penggera berbunyi di cawangan defendan, orang-orang di SKU telah menghantar pengawal-pengawal keselamatan mereka ke premis defendan. Pihak polis juga telah diberitahu. Namun begitu, orang-orang di SKU dan pihak polis tidak dapat masuk ke dalam premis kerana kedua-dua pemegang kunci tersebut tiada. Tiada arahan daripada ibu pejabat defendan bahawa satu daripada pemegang kunci dapat

dikesan. Juga tiada penjelasan kenapa kedua-dua orang tidak dapat dikesan. Sistem keselamatan tersebut memerlukan pemegang-pemegang kunci tersebut sentiasa ada apabila penggera dipasangkan. Defendan telah gagal berbuat demikian. Ini dengan jelas satu kes yang cuai di pihak defendan dan/atau ejen-ejennya. Adalah untuk defendan supaya sedar akan kewujudan alat-alat atau detektor-detektor yang ada dan untuk menggunakannya bagi melindungi barangan berharga plaintif-plaintif. Ia tidak mencukupi untuk hanya bergantung kepada penggera tersebut kecuali jika harga alat-alat tersebut terlalu mahal (lihat ms 381F–G, 382B, D–E); *Shelton v ANZ Banking Group* [1984] VC LEX 329 diikut.

(3) Sebagai seorang pegawai bank yang berfikiran waras, defendan sepatutnya boleh meramal bahawa ia tidak mencukupi untuk mempunyai sistem dan/atau peralatan-peralatan keselamatan yang biasa dalam premisnya yang menyimpan banyk wang tunai dan barangan berharga. Sistem keselamatan tidak mempunyai satu 'infra-red motion detector' atau 'seismic detectors'. Ia boleh diramal secara munasabah untuk mempunyai 'infra-red motion detectors' di lantai bilik kukuh kerana pencuri-pencuri akan tertarik kepada barang-barang berharga dalam bilik kukuh tersebut dan akan berusaha apapun untuk mendapat barangan berharga tersebut. Ia boleh diramal bahawa 'seismic detectors atau 'infra-red motion detectors' adalah alat peranti untuk melindungi lantai bilik kukuh dan barang-barang berharga di dalamnya (lihat ms 383H–384A).]

Notes

For cases of negligence by banks, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) para 592.

For cases on res ipsa loquitor, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 861–886.

Cases referred to

Bolton v Stone [1951] AC 850 (folld)

Government of Malaysia & Ors v Jumat bin Mahmud Anor [1977] 2 MLJ 103 (refd)

Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145 (refd)

Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty & Anor (Wagon Mound No 2) [1967] AC 617 (refd)

Russel v London & South Western Railway Co [1908] 24 TLR 548 (refd)

Shelton v ANZ Banking Group [1984] VC LEX 329 (refd)

Wong Eng v Chock Mun Chong & Ors [1963] MLJ 204 (refd)

Legislation referred to

Evidence Act 1950 s 101 to 103

(*K Kulasekar Achan & Assoc*) for the plaintiffs.
(*Shearn Delamore & Co*) for the defendant.

Abdul Hamid Said J: The 18 plaintiffs ('the plaintiffs') in this case were customers of the defendant, ie Mayban Finance Bhd. The plaintiffs had hired the safe deposit boxes located at the defendant's premises at the Taman Cheras Branch, Kuala Lumpur.

It is not disputed that there was a break in at the defendant's premises. It happened between 4.30pm (a Thursday) on 2 March 1995 and the morning of 6 March 1995 (a Monday). PW1 in his examination-in-chief stated from what he could gather after the event was that the burglars entered a monsoon drain in the vicinity of the premises, and then entered an underground drain which led to the area outside the main front entrance of the premises. They then tunnelled their way underground for a distance approximately 40–45ft until they were directly beneath the strong room floor. They then dug their way through the strong room floor into the strong room and proceeded to break open and empty the safe deposit boxes therein.

The plaintiffs had filed this claim and pray for the delivery of the goods or alternatively they pray for damages for the loss of the goods, interests and costs.

The parties have agreed that the hearing before the court is only to determine liability. Damages will be determined by the deputy registrar or the senior assistant registrar.

In the claim, the plaintiffs pleaded causes of action in bailment, contract and tort. At the submission, counsel to the plaintiffs dropped their claim in bailment and proceeded on contract and tort only.

The defendant contends that the burden of proof lies on the plaintiffs. In *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145, the Federal Court held that 'the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it: for a negative is usually incapable of proof.' (see also s 101 to 103 of the Evidence Act 1950).

The plaintiffs had however also pleaded res ipsa loquitor which means 'the thing speaks for itself.' The effect of this would be to shift the burden of proof from the plaintiffs to the defendant.

There are many reported cases on the res ipsa loquitor. However, both counsels quoted the case of *Wong Eng v Chock Mun Chong & Ors* [1963] MLJ 204. In this case Gill, J as he then was, quoted Kennedy LJ, as he then was, in *Russel v London & South Western Railway Co* [1908] 24 TLR 548.

I understand the passage to mean that,

> ... there is, in the circumstances of the particular case — (in the case of this particular case) some evidence which ... of reasonable argument, makes it more probable ... there was some negligence, upon the facts as shown and

> undisputed, than that the occurrence took place without negligence ... the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; ..., some want of reasonable care under the circumstances ... It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of.

The issue therefore is whether there was 'some act of negligence' on the part of the defendant. The House of Lords in *Bolton v Stone* [1951] AC 850 reinforce this at p 859 'where the circumstances giving rise to the cause of the accident are unknown that doctrine (ie res ipsa loquitor — my addition) may be of great assistance, but where as in the present case all the facts are known, it cannot have any application ...; the only question is, do the facts or omissions which are known and which led up to amount to negligence.'

I am of the opinion the facts ie cause of the loss are known and res ipsa loquitor as no application to the facts of this case. This is a case of negligence. The issue therefore is whether there was some want of care by the defendant.

It was not denied that the plaintiffs hired the safety boxes at the defendant's premises. The 2 March 1995 to 6 March 1995 was the long Hari Raya break. The defendant's premises was empty ie no workers. There was no security guard. There was however, what was alleged, a comprehensive alarm system, provided by a company said to be 'a leading provider of security systems.'

The alarm system was connected to the Central Monitoring System ('CMS'). In the event the alarm goes off, the people monitoring the 'system' would inform the employees of the bank, in this case anyone of the two employees of the defendant. They have the keys to the premises to check the inside of the premises whenever the alarm is activated. The alarm provider would then send their own security team to the premises. The centre also informed the police.

On 3 March 1995 at about 11.59am (the long break began on 2 March 1995), the alarm was triggered. The CMS people sent their security people to the defendant's premises. The police was also informed. The CMS and the police were not able to go into the premises as the two key holders could not be contacted. The alarm went off by itself after 15 minutes. There was no instruction from the defendant's headquarters that one of the key holders has to be available all the time. Neither was there any explanation why both were not available. Realizing this problem the defendant's Manager, Internal Audit, on the hind sight issued on 10 March 1995 an inter office memo to all branch managers '... to ensure that at least one key holder is available for contact during non-working hours ...' (see IDB p 17).

In *Shelton v ANZ Banking Group* [1984] VIC LEXIS 329, (*Shelton*'s case), the Supreme Court in Victoria held at p 12 that:

> Any banking system of security would, I find, require that following an alarm, prompt attendance at the Bank should follow. Such a system was not in force at the Windsor Branch on 17 November 1981.

In the present case the system was there. Two officers of the defendant had the keys to open the Bank upon being contacted by the CMS. Unfortunately none of the officers were available. The security system provider supervisor, SD2, stated that the alarm that went off also came from the strong room zone. SP3 in his evidence stated that the burgofon in the safe deposit room was reactivated. (The burgofon was covered with silicone by the burglars). SP3 also informed the court that it would be better to have infra-red motion detector.

The security system include the key holders to be readily available when the alarm is activated. The defendant had failed to do this. This is therefore a clear case of negligence on the part of the defendant and/or its servants or agents.

In *Shelton*'s case, the Supreme Court of Victoria observed at p 12 that:

> By 1981, technology had moved far ahead of its position as at 1966. Long before 1981 seismic devices were preferred to acoustic devices. Perimeter alarms and space detectors, whether microwave, ultrasonic, or passive infra-red, had been developed. In fact immediately after the robbery, seismic detectors were installed ... and in the vault ultrasonic detectors were installed guarding the approach to the vault ...

The above serves the purpose that there are devices or detectors as early as 1981 that are available in the market to ensure the safety of the plaintiffs valuables in the defendant's safes. I am of the opinion it is for the defendant to be aware of the existence of these devices and to use them to protect the plaintiffs' valuables. It is in my opinion insufficient to rely only on the alarm unless the price of the additional devices is extremely excessive.

The defendant in his submission contends that the risk of a break-in in the manner in which it occurred was too remote and such a break in was not reasonably likely to happen. Because of the remoteness of the risk that the burglars would enter the strong room in the manner described above the defendant did not take steps to reinforce the floor of the safe deposit box room. The defendant also was not advised to connect the room floor to the alarm system.

It is an issue of negligence ie to exercise reasonable care. In the case of *Government of Malaysia & Ors v Jumat bin Mahmud Anor* [1977] 2 MLJ 103, the Federal Court at p 104 decided:

> ... in considering whether or not the appellants were in breach of their duty of care to the respondent it was necessary for the trial judge to consider first whether the risks of injury to the plaintiff were reasonably foreseeable and secondly, assuming it was, whether the appellants took reasonable steps to protect the plaintiff against those risks ...' The issue therefore '... ex hypothesis (the teacher) should reasonably have foreseen'. See *Richard v State of Victoria* [1969] VR 139, 141.

The standard of care defined in *Bolton v Stone* [1951] AC 850 states at p 863:

> The standard of care in the law of negligence is the standard of an ordinary careful man, but in my opinion an ordinary careful man does not take

> precautions against every foreseeable risks ... many foreseeable risks are extremely unlikely to happen and cannot be guarded against except by almost complete isolation.

I remind myself that *Bolton v Stone* was a case involving a cricket ball that hit Miss Stone while standing on the highway outside her house. The ball was hit by a batsman in a cricket match played on a cricket ground. I would however like to venture that in this century the decision in *Bolton v Stone* may be different with new equipments in use and the more efficient techniques practised in the game of cricket.

Be that as it may, the definition of standard of care of that of an ordinary man still stands. The issue is whether the defendant compromised the safety of the plaintiffs' valuables by not putting in additional or advanced security system or devices in the premises. Was it reasonably foreseeable that the additional or advanced device would enhance the security of the strong room.

In commenting on the decision of the House of Lords in *Bolton v Stone*, the Privy Council in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty & Anor (Wagon Mound No 2)* [1967] AC 617, at p 642:

> ... The House of Lords held that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it.
>
> But it does not follow that no matter what the circumstances may be it is justifiable to neglect a risk of such small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so ... . In their Lordship's judgment *Bolton v Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man ...

By 1981, there are many sophisticated security devices and system available in the market. It is the duty of the defendant to be up to date on the availability of the security devices in the market to ensure the safety of the strong room. For the defendant to rely only on the advice of a company is not complimentary. The House of Lords in *Wagon Mound No 2* at held (2), p 618:

> (2) That, on the facts, a reasonable man having the knowledge and experience to be expected of the appellant's chief engineer would have known that there was a real risk of the oil on the water catching fire and the fact the risk was small did not in the circumstances justify no steps being taken to eliminate it.

If in the *Wagon Mound 2*, the reasonable man was the Chief Engineer, in this case it is a banker. A banker should have foreseen that it is not sufficient to have what I would call a basic security system and/or devices in the defendant's premises that store so much cash and valuable. There was no evidence that a security expert was employed to ensure the safety of the plaintiffs' valuables. The so called security system did not have the infra-red motion detector. It is reasonably foreseeable to my mind to have the infra-red motion detector on the floor of the strong room as burglars would be

attracted to the valuables in the strong room and would employ whatever means to get at them. It is therefore foreseeable that the seismic detectors or infra-red motion detector would be valuable device to protect the floor of the strong room and the valuables therein.

It is my finding that as a reasonable banker of their standing, the defendant had failed to ensure (make certain) that the 'valuables' were safely kept and taken care of. My finding is based upon the failure of the defendant to act when the alarm was activated and the fact that they have failed to put in additional security device(s).

I therefore hold the defendant wholly liable for the loss. I also award costs to the plaintiffs. The deputy registrar is to fix an early date to assess the damages.

Defendant wholly liable for loss. Costs to the plaintiffs. Damages to be assessed by the registrar.

Reported by Andrew Christopher Simon